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SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 262

CRISTOBAL GONZALES PADILLA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

CRISTOBAL GONZALES PADILLA,
=75128—P. M. B.,
Leavenworth, Kansas.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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IN THE

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No.

CRISTOBAL GONZALES PADILLA,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

I.

STATEMENT.

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of

Appeals for the Ninth Circuit entered on May 6, 1959, affirming the judgment of conviction entered on May 6, 1957, of the United States District Court for the Southern District of California, Central Division, Los Angeles.

II.

OPINIONS BELOW.

The judgment sought to be reviewed was entered on May 6, 1959, and it is not understood as yet being officially reported; the opinion of the Court of Appeals below is appendixed at pages A1-A3 of the appendix herein. Petitioner was granted until June 15, 1959, to apply for a rehearing; petition for a rehearing was denied on June 4, 1959; the order notifying denial of rehearing without further opinion is set forth in the appendix at page A4; the mandate of the Court of Appeals below was issued on June 12, 1959, see appendix page A5.

III.

JURISDICTIONAL STATEMENT.

The jurisdiction of the United States District Court for the Southern District of California, Los Angeles, was predicated upon the provisions of Title 18, U.S.C.A., Section 3231.

The United States Circuit Court of Appeals for the Ninth Circuit had appellate jurisdiction to review the judgment of conviction of the District Court pursuant to Title 28, U.S.C.A., Section 1291.

The jurisdiction of this Honorable Court to review the judgment of the United States Court of Appeals for the Ninth Circuit is invoked pursuant to Title 28, U.S.C.A., Section 1254(1), and the Fed. Rules of Cr. Pro., Rule 37.

The time in which to file the petition for writ of certiorari is governed by Rule 22 (2) of the Revised Rules of this Honorable Court which limits the time to thirty days in a criminal case, unless enlarged by order of the Court or a justice thereof. An order was entered on June 29, 1959, extending the time to August 3, 1959, in which to file the petition for writ of certiorari, see appendix page A6.

IV.

STATEMENT OF THE CASE.

The indictment, in five counts, was filed on March 13, 1957, charging petitioner and his co-defendants, Antonio Espinoza Ramos and Issac Gomez Gomez, with violations of Title 21, U.S.C.A., Section 174 (R. 2 through 7). Counts one, two and three of the indictment do not involve petitioner and for the sake of brevity are omitted from this petition. Attention is called to the overt acts in count five of the indictment; there are nine overt acts, eight of these overt acts are directed at the charges in counts one, two and three, not involving this petitioner, in that, the trial judge held that petitioner did not enter into the conspiracy until February 20, 1957 (R. 1000), and all overt acts, excepting number nine, are omitted but may be found in the appendix to this petition at page A7. It is deemed necessary to set forth count four in its entirety, viz:

Count Four: On or about February 20, 1957, in San Diego County, California, within the Southern Division of the Southern District of California, defendants Issac Gomez Gomez and Cristobal Gonzales Padilla did, after importation, *knowingly and unlawfully* receive, conceal, and transport, and facilitate the concealment and transportation of, a certain narcotic drug, namely: approximately 25 ounces of heroin, *and knowingly assist* in so doing, which said

heroin, as the defendants then and there well knew, had been imported into the United States of America contrary to law, in violation of United States Code, Title 21, Section 174. *Id.* (Italics supplied).

Count Five: Beginning on or about February 4, 1957, and continuing to the date of the return of this indictment, defendants Antonio Espinoza Ramos, Issac Gomez Gomez and Cristobal Gonzales Padilla did agree, confederate and conspire together to commit certain offenses against the United States as follows: to *fraudulently and knowingly* import and bring into the United States certain narcotic drugs, namely: Heroin and smoking opium, contrary to law, and to conceal, sell, transport and facilitate the concealment, sale and transportation of said narcotic drugs after being imported and brought into the United States contrary to law, in violation of United States Code, Title 21, Section 174:

To effect the objects of said conspiracy the defendants committed divers overt acts in the Southern District of California among which are the following:

Note: The trial judge held (R. 1000), that from February 4, 1957, to February 11, 1957, that the government could not prove a conspiracy. This involves overt acts one, two, three and four which are omitted from this statement but may be found in the appendix at page A7. The trial judge then held (R. 1000), that from February 12, 1957, to February 20, 1957, that there was evidence of a conspiracy between co-defendants Ramos and Gomez.[1] Again the trial judge held (R. 1000), that he believed that there was evidence that petitioner entered the conspiracy on February 20, 1957.

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1. R. S. Cantu mentioned in the overt acts is an agent of the Narcotic Bureau.

The only overt act here that involves the petitioner is No. 9, which charges as follows: On or about February 20, 1957, in San Diego County, California, defendants Issac Gomez Gomez and Cristobal Gonzales Padilla, facilitated the transportation and concealment of approximately 25 ounces of heroin. *Id.* (Italics supplied).

The trial judge did not advise that petitioner was entitled to a trial by jury as guaranteed by the Federal Constitution; nor did he advise petitioner that there was a statutory right embedded in (Title 21, U.S.C.A., Section 174). Petitioner's attorney and the United States Attorney agreed that they would try the case without a jury and asked petitioner to sign a waiver. The United States Attorney merely stated to the trial judge that trial by jury has been waived, the trial judge not making any comments or advising petitioner as to the Constitutional and statutory rights to trial by jury. The trial judge, sitting without a jury, dismissed count one against co-defendant Ramos at the conclusion of the Government's case in Chief (R. 452); and held that from February 4, 1957, to February 11, 1957, there was no evidence or proof of a conspiracy (R. 1001) and granted the Government's motion relative to the application of the evidence[2] (R. 1000) and on May 6, 1957, found petitioner guilty on counts four and five, overruling motion for a new trial (R. 1006), and sentenced petitioner for a term of five years on count four and ten years on count five, the terms to run consecutively; total fifteen years; no fine was imposed (R. 1002).

Italics supplied as petitioner's unless otherwise specified.

2. Subsequent to the 12th, I think that there is evidence in the case which will sustain a finding that there was a conspiracy and any statement made by any one of the parties implicating the other should be received in evidence (R. 1001).

V.

STATEMENT OF FACTS.

The case was called for trial on April 23, 1957, the Honorable Harry C. Westover, Judge, presiding. The trial judge did not advise petitioner, through the interpreter, of the petitioner's Constitutional rights and statutory rights to trial by jury. The jury was waived in this criminal case by defense counsels and the United States Attorney without the trial judge participating therein. An interpreter was sworn, and remained present throughout the trial (R. 3).

Inasmuch as this petition for writ of certiorari is made by only one of the defendants it is deemed appropriate to focus attention to those facts pertaining to the action of petitioner's co-defendants. This is a conspiracy case involving a long term of imprisonment without possibilities of parole even though the facts reveal that petitioner is a first offender without any previous arrests for any crime whatsoever. Petitioner claims here, as he did in the District Court and the Circuit Court of Appeals below, that he is innocent of the crimes charged and that he was woven into a net of circumstances over which he had no control. The record of evidence fails to establish that petitioner entered into an agreement with Ramos or Gomez in respect to the 25 ounces of heroin. The facts, leading up to the time of petitioner's arrest may be summarized from the record as follows:

Petitioner testified that he had driven to Los Angeles from Mexicali, Mexico, for the purpose of purchasing a truck (R. 656). He had about $2,300 with him and that he had withdrawn about $1,700 of the money from his bank in Mexicali (R. 822) for the purpose of buying a truck.

This sum was withdrawn in December, 1956, and was kept in his house (R. 822) after that date until he came to Anaheim on February 20, 1957.

That when he left Mexicali on February 20, 1957, he was with Issac Gomez Gomez and that Gomez was to drive petitioner's car back to Mexico if petitioner found and purchased a truck. Petitioner had no knowledge of any narcotic transactions between Gomez, Ramos and the Narcotic Agent Cantu and did not discuss narcotics with Gomez while enroute to Los Angeles. They left Mexicali about 9:45 or 10:45 A. M. and arrived in Anaheim about 4:30 p. m. (R. 664), after having stopped at Los Angeles where they arrived about 3 or 3:30 p. m. (R. 665). He was with Gomez at the restaurant, and then, about 6 p. m. he decided to rent a motel room to wash up and rest. They went to the A-1 Motel and registered and washed and rested for about 45 minutes, then left and went to a bar, and thereafter drove around and bought some liquor before they left town for Tijuana about 8 p. m.

Petitioner testified that they looked for the truck, which they had come to Los Angeles to buy, for "a short time" while he was driving around "looking at lots" (R. 695). He owned a "miscellaneous" store in Mexicali. While in the United States he bumped into Ramos in Anaheim completely by accident (R. 690).

The transcript of the evidence shows that Ramos testified that he received the 35 ounces of heroin from a Mexican named Ysidro Lopez (R. 539) on the 20th of February (R. 540) and he denied receiving it from Issac Gomez (R. 541). Ramos admitted that he brought it across the border (R. 541) to Anaheim in a 1950 or 1951 White Chevrolet which he borrowed from a friend (R. 542). Ramos claimed he was employed by Ysidro Lopez to bring the heroin to

Anaheim and that he was not employed by Gomez or petitioner (R. 543). He admitted that the coat, Exhibit 5, was his (R. 545). When he (Ramos) left Mexicali he had the heroin in the springs of the seat of his car. Ramos testified he put some of the heroin in his coat when he was at the Highway 101 Motel where he had registered and later had accidentally bumped into petitioner on the street in Anaheim while petitioner and Gomez were together.

At the time of petitioner's arrest the agents claimed that they found a card from the Highway 101 Motel, Orange, California, in the glove compartment of petitioner's car (R. 913-914). Petitioner denied that he had been registered at the Highway 101 Motel; and testified that he had been registered at the A-1 Motel in Anaheim (R. 697). The Government made no investigation or attempt to prove that petitioner was registered at the Highway 101 Motel and relied on the fact that the possession of the card (Government's Exhibit No. 7)—(R. 700) was proof that petitioner had been there.

The Government's case against petitioner was based upon the fact that he had been in Anaheim, California, on February 20, 1957. There was no evidence of record that petitioner participated in the crime of conspiracy or had knowledge of the presence of the narcotic in his car which had been planted there by Ramos while petitioner was away from his car. Two agents of the Narcotic Division testified that they observed petitioner standing on a corner talking to Gomez. The results of these two agents' observations may be summarized as follows: Ramos was seen walking East on Center Street in Anaheim at about 3:45 p.m. on February 20, 1957, by William Gilkey, a Narcotic Agent (R. 248). At that time Ramos was wearing a jacket (R. 255). At about 4:15 or 4:30 p.m. Ramos was seen by Gilkey

talking to Gomez and petitioner on the corner of Center and Los Angeles Streets. Gilkey later saw Ramos with Frank G. Vronek at the Highway 101 Motel (R. 253). This was about 6:45 p.m. or 7:00 p.m. and at that time Ramos was not wearing his jacket (R. 255). Gilkey testified that after Gomez and Petitioner had the conversation with Ramos just referred to he observed them entering the two-tone black Buick with Baja license plate (R. 253). They drove around Anaheim for about an hour after which the witness lost them due to a car failure (R. 254).

Frank G. Vronek, an investigator of the District Attorney's office testified that on February 20, 1957, he saw Ramos in the Valencio Hotel Coffee Shop. Cantu was with Ramos and they conversed in Spanish in his presence for about five minutes (R. 268). At the conclusion of the conversation Cantu told Vronek to stay with Ramos and left. Ramos was eating some pie and they conversed in English. Ramos said that he was going to leave; that Vronek should wait for him as he was going to meet Issac and that there was another man with Issac whom Issac did not want anyone else to see (R. 269). He remained in the cafe until Mr. Cantu returned. He also saw Gomez on that day about 4:40 p.m. He saw Gomez going out of the driveway of a cafeteria located at the corner of Los Angeles and Center Street in Anaheim. Petitioner was with Gomez (R. 271). He had a brief conversation with Gomez and when this was finished Gomez spoke to petitioner in Spanish after which petitioner left them and walked to a bar on Los Angeles Street. Gomez thereupon crossed Center Street and the witness lost sight of him (R. 272).

An hour later he saw Gomez walking past Agent Cantu's Government vehicle and he called Gomez back to the vehicle (R. 273). He later saw Ramos about 5:35 p.m.

seated in a Grey Chevrolet Coupe with Baja, California, plates. He entered the Chevrolet (R. 274). Ramos was not wearing a jacket at the time, but he had been wearing one about 3:40 in the afternoon when he had previously seen Ramos. At 5:35 p.m. it was cool (R. 276). They drove to Center Street near Los Angeles Street in Anaheim, parked the vehicle, and Ramos got out looking for Issac Gomez (R. 277). The witness then saw Gomez and petitioner on the sidewalk near a barber shop on Los Angeles Street. They were talking (R. 278). Each of the defendants talked but the witness could not understand the words. Ramos directed the conversation to Gomez at which time Gomez turned to petitioner and the witness observed petitioner making a motion with his head as if to make a negative answer (R. 280). Then Ramos returned to the car and said to the agent, "Issac doesn't want to give me the 25 ounces. The other man, he has got a deal, and he is the reason why Issac doesn't want to deal" (R. 280-281).

During the trial counsel for petitioner invoked the rule that any statement of any one of the codefendants made to the agents should be considered only as evidence against the defendant making the statement. The Court sustained each objection throughout the trial and ruled that: "The objection is good. The conversation cannot be considered in regard to Padilla" (R. 226). Petitioner did not speak to any narcotic agent and was not present when Ramos and Gomez talked to Agent Cantu and Vronek. Ramos denied that he told the agents that petitioner was involved and Ramos' testimony was not impeached (R. 461 through 651). At the conclusion of the trial the Court granted the Government's motion that all evidence with respect to the acts and declarations of the defendant Ramos on the 20th of February, 1957, and up to the moment of his arrest be received in evidence and con-

sidered as to the petitioner; that all of the acts and declarations of the defendant Gomez up to the moment of his arrest be received in evidence as to petitioner; and that all acts and declarations of petitioner be received and considered as to all defendants (R. 1001). The Court deferred ruling on this motion until Conclusion of the Case, and after having heard all evidence the Court granted the motion (R. 1001).

VI.

QUESTIONS PRESENTED.

(1) May a defendant on trial for an infamous crime to violate the Narcotic Control Act waive trial before a jury where the statute creating the offense expressly states that such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury?

(2) Where a defendant is indicted for a conspiracy to violate the Narcotic Control Act, is the proof of the unlawful agreement necessary to sustain the judgment of conviction?

(3) May the United States Custom Agents refuse to return ($2,350.00) which was proven to have been withdrawn from defendant's bank account and later cleared through the Bureau of Narcotics as not being listed as marked money?

VII

STATUTE INVOLVED.

Each Count of the indictment was based upon Title 21 United States Code, Section 174, which provides in pertinent part as follows:

"Whoever *fraudulently or knowingly* imports or brings any narcotic drug into the United States or any Territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, *knowing* the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than 5 or more than 20 years * * *"

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction *unless the defendant explains the possession to the satisfaction of the jury.*" (Italics supplied).

VIII.

REASONS RELIED UPON FOR THE WRIT.

1. The decision of the United States Court of Appeals for the Ninth Circuit has decided an important question of federal law under the Narcotic Control Act which has never been decided by this Honorable Court and so far departs from the usual course of judicial proceedings so as to call upon this Honorable Court's power of supervision.

2. The decision of the United States Court of Appeals for the Ninth Circuit holding that, notwithstanding the provisions of the statute which creates the offense and contains the word "jury", petitioner could waive trial before a jury hinges on a State Court's decision and is in conflict with the provisions of the United States Constitution, which provides that "the trial of all crimes, except in cases of impeachment, shall be by jury * * *" Article III, Section II, Clause III; 21 U.S.C.A., Sec. 174.

3. The decision of the United States Court of Appeals for the Ninth Circuit holding that there was sufficient evidence to sustain the convictions on counts four and five is unsupported by the record and conflicts with decisions of other Circuit Courts of Appeals on the same subject matter; the decision also conflicts with past decisions of the Ninth Circuit Court of Appeals on the same subject matter.

4. The decision of the United States Court of Appeals for the Ninth Circuit is in direct conflict with outstanding cases decided by this Honorable Court on the same subject matter.

5. The decision of the United States Court of Appeals for the Ninth Circuit is so lacking in essential elements of due process of law as required by the Fifth Amendment as to render its decision reversible on the bases of the trial record.

IX.

THE LAW AND THE ARGUMENT IN SUPPORT OF REASONS FOR ALLOWING THE WRIT.

POINT I.

Petitioner's Plea of Not Guilty to the Possession of the Narcotic Drug Invoked the Statutory Presumption and the Trial Court Should Have Rejected the Waiver of Jury in This Criminal Case.

(A) The United States Circuit Court of Appeals for the Ninth Circuit Erred in Holding That Trial by Jury Could Be Waived in This Criminal Case.

It is respectfully urged here that the right of trial by jury is a right guaranteed by the Federal Constitution. Article III, Section II, Clause III, provides *inter alia*, that:

> "*The trial of all crimes*, except in cases of impeachment, *shall be by jury* * * *; * * *." (Italics supplied).

In the case at bar the statute here (21 U.S.C.A., Section 174) speaks of "*whenever on trial*" the defendant is shown to have or to have had possession of a narcotic drug, without mentioning of pleas of guilty, or mentioning sales or receiving or concealment of the narcotic drug, the presumption being that the burden of proof is on defendant to explain how the narcotic drug came into his possession (Italics supplied).

The Court below in its casual *Per Curiam* decision said:

> "*We doubt* if the Congress meant any more than 'trier of the facts' when it used 'jury.'"[3] (Italics supplied).

It is quite apparent that had the Congress not intended that the explanation be made to a jury it would have no doubt used words to that effect. The Court of Appeals below was not certain of the intent of Congress in that the Court said "*We doubt*" if the Congress meant any more than "trier of the fact" when it used "jury." The Court below then hinged its finding on a State Court's decision in *Nathanson* v. *Murphy*, *supra*, without any citation of law from any federal Court of the United States. Petitioner urges that the Congress intent was, "that when a defendant entered a plea of not guilty", that the issue as to possession of the narcotic drug should be explained to a jury. The Congress intent here rests upon the fact that possession of narcotic drugs is not an offense and merely

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3. Cf. *Nathanson* v. *Murphy*, 132 Cal. App. 2d 363, 282 P.2d 174.

a rule of evidence. *United States v. Landry*, 7 Cir., No. 12,268, . F.2d , decided July 30, 1958. The statute creating the offense shifts the burden of proof on a defendant to prove his innocence. The Congress no doubt thought that a defendant would be in a better position to explain the possession to a jury of twelve, rather than explain it to the single judge sitting without a jury.

In the case at bar the United States in its brief (Govt. Br. p. 18) in the Court below said: "So the error of the Court, if any, in failing to force a jury upon appellant at the time he waived trial by jury, was non-prejudicial." It is urged here that the error of the district Court was highly prejudicial and deprived petitioner of that fair and impartial trial commanded by the Sixth Amendment to the United States Constitution. The Sixth Amendment to the United States Constitution provides, *inter alia*, that:

> "In all criminal prosecutions the accused *shall enjoy the right* to a speedy and public *trial by an impartial jury* of the state and district wherein the crime shall have been committed, * * *." (Italics supplied).

No doubt the Congress thought that a jury should be selected to try the issue where it is shown that a defendant had possession of the narcotic drug. By this statute (21 U.S.C.A., Section 174) providing for the intervention of a jury it would seem that the Court should have rejected the waiver and at least advised petitioner of his Constitutional and statutory rights to trial by jury. As may be seen from the record, there was no advice given by the trial judge on the right of trial by jury in this criminal case. Petitioner is a first offender of the law and the laws of the United States were alien to him at the time he signed the waiver. He could not speak or understand the English language at the time of trial. He

had no knowledge of the Constitution of the United States and no knowledge of the Narcotic Control Act. He was given a paper and asked to sign it without the Court explaining through the interpreter that he was entitled to a jury trial if he so desired; nor did the trial judge explain that petitioner had the right to explain the presence of the narcotic drug to the satisfaction of a jury, rather than the Court, if petitioner so desired. It is urged here that there was no waiver made intelligently and competently by petitioner and that neither the trial judge nor counsel explained to petitioner his rights under the Sixth Amendment and the statutory provisions of 21 U.S.C.A., Section 174. In *Glasser* v. *United States*, 315 U.S. 60, this Court said:

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, every reasonable presumption against a waiver of fundamental rights is indulged."

Assuming, but not conceding, that trial by jury may be waived. In the case at bar there is the right to trial by jury guaranteed by the Constitution of the United States. Article III, Section II, Clause III. Still there is another right to trial by jury as embedded in the statute creating the offense. 21 U.S.C.A., Section 174. Therefore, it would require a waiver of trial by jury as guaranteed by the Constitution; and an express waiver of the statutory provisions of trial by jury as required by (21 U.S.C.A., Section 174). Which one of the provisions was waived by petitioner, *i. e.*, assuming trial by jury may be waived in a criminal case? The trial judge did not advise petitioner of his Constitutional rights or his statutory rights to trial by jury. Nor did counsel for petitioner advise him of his rights and merely suggested that the waiver be signed. It is urged here that petitioner did not waive

the provisions for trial by jury as required by the statute because he did not know the right existed. If petitioner did not intelligently and competently waive his rights under the Constitution and the statute to trial by jury, the guaranty stands as a judicial bar to a valid conviction. Cf. *Johnson* v. *Zerbst*, 304 U.S. 458. To preserve against the waiver of fundamental rights, see *Aetna Insurance Co.* v. *Kennedy*, 57 S. Ct. 809; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 57 S. Ct. 724.

It is respectfully submitted that the Circuit Court of Appeals below erred in its holding that petitioner was not entitled to trial by jury. Its decision hinges on a state court's decision in *Nathanson* v. *Murphy*, *supra*, which is inapplicable to the statute (21 U.S.C.A., Section 174) and the intent of Congress.

POINT II

There Was No Proof of Guilt, Direct or Circumstantial, to Sustain the Trial Court's Finding of Guilt on Count Four of the Indictment.

(B) The United States Court of Appeals for the Ninth Circuit Erred in Holding There Was Sufficient Evidence to Sustain the Conviction on Count Four of the Indictment.

It is respectfully urged here that the record is devoid of any proof that petitioner knowingly and fraudulently, after importation, transported the narcotic drug and facilitated the transportation and concealment in violation of 21 U.S.C.A., Section 174. The argument here is that there was no evidence that petitioner knowingly and feloniously transported the narcotic drug as charged in Count four. The testimony shows that (Ramos a codefendant) testified that he placed the jacket containing the twenty-five ounces of heroin in a green car without knowing who owned the

car (R. 570). Ramos further testified that when he placed the jacket in the green car he did not know who drove the car (R. 570-571).

It is urged here that the statute (21 U.S.C.A., Section 174) creating the offense expressly provides that whoever fraudulently or knowingly commits any of the acts denounced by the statute is guilty of an offense. The indictment here charges that petitioner knowingly received and concealed and facilitated the transportation of 25 ounces of heroin. If the facts show that petitioner did not have knowledge of the presence of the heroin in his car, at the time he left Anaheim, he would not be guilty of the charge set forth in Count four. It is argued that "the possession must have been with guilty knowledge or intent" and the inferences reasonably to be drawn from the evidence must not only be consistent with his guilt but inconsistent with every reasonable hypothesis of his innocence. *Kassin v. United States*, 5 Cir., 87 F. 2d 183, 184. It is not reasonable to believe that petitioner would have consented to the presence of the heroin in his car knowing that he would be stopped at the border by Custom Agents. It is argued here that when Narcotic Agent Carter testified that Ramos told him that the other man with Gomez was advising Gomez not to make the delivery, the record shows (R. 42, 63, 66, 73), that petitioner's counsel objected as follows:

Mr. Fitzpatrick: I will object to this as to the defendant Padilla.

The Court: It can be received only as against Ramos.

Mr. Fitzpatrick: Objected as to the defendant Padilla, your Honor.

The Court: This can be received only as to the defendants Gomez and Ramos.

Mr. Fitzpatrick: I object to that as to the defendant Padilla.

The Court: It can only be received as to the defendants Gomez and Ramos.

It is respectfully shown that other Narcotic Agents testified as to what they had observed and as to what Ramos had supposedly told them and the Court of first instance ruled (R. 226) that Laurence Katz statement could not be considered in regard to Padilla; the same ruling also applied to the testimony of William Gilkey (R. 247 through 267); the same ruling also applied to the testimony of Frank G. Vronek (R. 267 through 317). Ramos denied that he had told the agents anything about petitioner (R. 461 through 651).

It is urged here that to make the provisions of (21 U.S.C.A., Section 174) applicable to petitioner, it was necessary to prove that petitioner was acting in concert with Ramos. *Thomas* v. *United States*, 10 Cir., 239 F. 2d 7, at page 10, the Court said, "There was no evidence that Thomas at any time had physical possession of the package. Therefore, in order to make the provisions of 21 U.S.C.A., Section 174, applicable to Thomas, it was necessary to prove that she was acting in concert with Williams. The evidence indicated and warranted the inferences that that package was intended for Williams, who manually accepted and received it and placed it on the coffee table. *Thomas merely created a suspicion of guilt and that it was insufficient to sustain a verdict of guilt.*" (Italics supplied).

In the case at bar the facts reveal that petitioner did not have physical possession of the jacket containing the heroin and the jacket was found on the back seat of petitioner's car by the arresting officers in the same position when placed there by Ramos.

In the case at bar the record of testimony falls short of being substantial evidence to sustain the government's

position that petitioner knowingly transported and facilitated the concealment and transportation of the narcotic drug. Petitioner's explanation as to the presence of the narcotic drug being in his car at the time of arrest appears in the record (R. 815 through 831). His testimony was unimpeached and a jury would have been in a better position to judge the facts (21 U.S.C.A., Section 174) than a judge sitting without a jury. Petitioner refers this Court to the decision of *United States* v. *Landry*, 7 Cir., No. 12, 268, F. 2d , decided July 30, 1958, which was reversed on precisely the same question tendered by the present petition, the Court citing numerous cases, said: "But no Court, so far as we are aware, had held that proof of possession by one person may be established by circumstantial evidence when the undisputed direct proof places the possession in some other person. It would not be helpful to quote the numerous definitions of the words "possess" and "possession" which have been called to our attention. As good a definition as we have seen is that of this Court in a criminal case, *United States* v. *Wainer*, 170 F. 2d 603, 606, the Court stated:

> "*To 'possess' means to have actual control, care and management of*, and not a passing control fleeting and shadowy in its nature." (Italics supplied).

In the case at bar the facts reveal that petitioner did not have actual control, care and management of the narcotic drug planted in his car by Ramos. Some of the facts may have created a mere suspicion of guilt against petitioner. But, as was said in *Thomas* v. *United States*, *supra*, at page 9, that:

> "Evidence which creates a mere suspicion of guilt is not sufficient to sustain a verdict of guilty. *Vick* v. *United States*, 5 Cir., 216 F.2d 228, 233; *Garrison* v. *United States*, 5 Cir., 165 F.2d 874; *Eng Jung* v. *United*

States, 3 Cir., 46 F.2d 63, 67; *Philphaw* v. *United States*, 8 Cir., 29 F.2d 225, 227; *Callagh* v. *United States*, 8 Cir., 15 F.2d 929, 931."

It is urged here that it is a fundamental rule that there must be substantial evidence of guilt in order to sustain a conviction. 12 Cyclopedia of Federal Procedure, 3rd Edition, Section 51-75, paragraphs 481-482; *United States* v. *Yeoman-Henderson, Inc.*, 193 F.2d 867 (7th Cir. 1952). The terms "substantial evidence" within the requirement of this rule has been construed to mean sufficient relevant evidence to cause a reasonably prudent person to accept as adequate to establish a defendant's guilt. 12 Cyclopedia Federal Procedure, 3rd Edition, Section 51-72, par. 448; See *Woodward Laboratories* v. *United States*, 198 F.2d 995, 998 (9th Cir. 1952). It has been stated that the evidence relied upon as "substantial" within the meaning of the above rule must be such as to exclude every reasonable explanation other than guilt. 12 Cyclopedia of Federal Procedure, 3rd Edition, p. 463; see *Yoffe* v. *United States*, 153 F.2d 570 (1st Cir. 1946). Failure to meet the exacting standards of the substantial evidence rule requires reversal of a conviction. 12 Cyclopedia of Federal Procedure, p. 483; *Yoffe* v. *United States*, *supra*.

It is respectfully submitted that the Court of Appeals below seriously erred in holding that there was sufficient evidence to sustain the verdict of guilty on count four. The Circuit Court of Appeals below in its affirmance failed to cite any case and its decision is in conflict with the decisions of other Circuit Courts of Appeals on the same subject matter, as well as decisions of this Honorable Court.

POINT III.

There Was No Proof of Guilt, Direct or Circumstantial, That Petitioner Entered the Conspiracy on February 20, 1957.

(C) The United States Court of Appeals for the Ninth Circuit Erred in Holding That There Was Sufficient Evidence to Sustain That Petitioner and Issac Gomez Gomez Trafficked in Narcotics from February 4, 1957 to March 13, 1957.

It is respectfully urged that count five of the indictment (the conspiracy count) insofar as petitioner is concerned fails to meet the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure, and the provisions of the Sixth Amendment to the United States Constitution. In the case at bar the government failed to prove there was an agreement between the petitioner and Ramos or Gomez. The government introduced the testimony of the narcotic agents who testified they had observed petitioner walking with Gomez; there was no proof that petitioner agreed to meet co-defendant Ramos in Anaheim on February 20, 1957; the testimony further shows that certain government witnesses testified that Ramos had made certain statements to them about petitioner; this was denied by Ramos; the indictment (Count Five) does not charge that petitioner met Gomez or conversed with any person; it does not charge that he came to Anaheim or was registered at a motel or charge that he did anything other than transport the narcotic drug, the subject of the fourth count. Here, the question is, "did petitioner enter into an agreement with defendants Ramos and Gomez"? There was no evidence introduced to prove an agreement was entered into on February 20, 1957. The mere fact that he was seen walking or talking to Gomez does not prove he agreed to commit the offense, the subject of the fourth count. The Tenth Circuit Court of Appeals in reversing a conspiracy case in *Carlson* v. *United States*, 249 F.2d 85, 10 Cir., at p. 86, said:

"The indictment in its Count I does not charge the substance offense of carrying on the business of a retail liquor dealer without paying the tax, but rather a conspiracy to commit such an offense. The gist of the offense of conspiring as defined by 18 U.S.C., Sec. 371, is agreement among the conspirators to commit an offense attended by the act of one or more of the conspirators to effect the object of the conspiracy. *United States v. Falcone*, 311 U.S. 205, 210, 61 S. Ct. 204, 85 L. Ed. 128; *Braverman v. United States*, 317 U.S. 49, 53, 63 S. Ct. 99, 87 L. Ed. 23. The controlling question on this count is whether Carlson entered into a conspiracy to carry on the business of a retail dealer at the Chambless premises, 4901 Northwest 50th Street, Oklahoma City, Oklahoma. There is no showing that appellant Carlson knew of such conduct on the part of Stone or acquiesced therein. *The charge is one of conspiracy. The gist of the offense is the agreement coupled with an overt act.* * * *" (Italics supplied).

In the case at bar the charge here is one of conspiracy. The gist of the offense is the agreement coupled with an overt act. *Carlson v. United States, supra.* In the case at bar it is urged that the evidence showed that an agent testified that Ramos said, "that the other person with Gomez was advising Gomez not to make a sale" (R. 280-281). Here, the conspiracy (count five) is the subject of the fourth count to transport, conceal and facilitate the transportation of the heroin. There was no evidence introduced by the government that petitioner entered into an agreement to transport and conceal the heroin, the subject of the fourth count. In *Tinsley v. United States*, 43 F.2d 899 (C.C.A. 8), the defendant was charged with conspiracy to commit larceny. The evidence showed Tinsley to be the central figure in the conspiracy, and that he had hired two persons named Widow and Eagle to steal horses and deliver them to him. There was no

connection between the work each was doing. They did not work together or carry out any arrangement to which both were parties. Neither had knowledge of the arrangement of the other. In holding that this evidence showed separate and distinct conspiracies and not one general conspiracy alleged in the indictment, the court said:

> "We are forced to the conclusion that the evidence does not show any mutual understanding or plan whereby appellant and Widow and Eagle were to cooperate in the stealing of horses. * * * *or that the minds of these parties met understandingly, to carry out a deliberate agreement* to commit the larcenies charged in the indictment. The evidence does not tend to show a conspiracy between Tinsley and Widow and Tinsley and Eagle, but they were separate distinct conspiracies and not the one charged in the indictment. This is not sufficient." *Terry* v. *U. S.*, 7 F.2d 28 (C.C.A.); *Wiart et al.* v. *U. S.*, 23 F.2d 791 (C.C.A.); *Stubbs* v. *U. S.*, 249 Fed. 571 (C.C.A.). (Italics supplied.)

In the case at bar the evidence does not show any mutual understanding or plan whereby petitioner and Ramos and Gomez were to cooperate in the transportation and concealment of the heroin or that the minds of the petitioner Ramos and Gomez met understandingly to carry out a deliberate agreement to commit the transportation charged in count five of the indictment. *Tinsley* v. *United States*, *supra*. In a conspiracy there must be some unity of purpose, design and understanding, some meeting of the minds in an unlawful agreement. There was none here. The conspiracy under count five as to this petitioner did not exist, was not proven, and merits consideration by this Honorable Court.

It is further argued that there was no showing that the statement made by Ramos to the Narcotic Agents were made in the presence of petitioner and the conspiracy

charged cannot be established against an alleged conspirator by evidence of the Acts or declarations of his alleged co-conspirators done or made in his absence. *Hauger* v. *United States*, 173 Fed. 54 (4 Cir.); *United States* v. *Richards*, (D.C. Neb. 1906) 149 Fed. 443. See also, *Thomas* v. *United States*, 57 F.2d 1039 (10 Cir.), the court at p. 1041, said:

> "To render evidence of the Acts or Declarations of any alleged conspirator admissible against his alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established." *Pope* v. *United States*, 289 Fed. 312, 315; *Kelton* v. *United States*, 294 Fed. 491, 495; *Isenhour* v. *United States*, 256 Fed. 842; *United States* v. *Goldberg*, 7 Miss. 175 Fed. Cas. No. 15,233; *United States* v. *McKee*, 3 Dill. 551, Fed. Cas. No. 15,686; *Burns* v. *United States*, 279 Fed. 982. See also, *Kuhn* v. *United States*, 9 Cir., 26 F.2d 463.

POINT IV.

The Refusal of the United States Custom Agents to Return the Money Belonging to the Petitioner Violates the Due Process Clause of the Fifth Amendment.

(D) The United States Circuit Court of Appeals for the Ninth Circuit Erred in Holding That It Did Not Have Power to Order the Money ($2,350) Returned to Petitioner.

It is respectfully urged that the question concerning the money was properly before the court of first instance.

The record of evidence shows as follows:

By Mr. Fitzpatrick:

Q. Did you have some money to buy a truck?

A. Yes.

Q. How much did you have?

A. I do not know exactly.

Q. Approximately.

A. I had about $2,300.00

Q. Where did you get that money?

A. That money, I took it out of my bank.

Q. What is the name of the bank?

A. Banco Mexicano de Occidente.

Q. Is that in Mexicali?

A. Yes.

Q. They have records of your withdrawals, is that correct?

Mr. Abbott: I will object, your Honor, I don't think the witness knows what records the bank has.

The Court: Sustain the objection.

Mr. Fitzpatrick: Very well, your Honor.

The Court: I suppose banks do have records.

Mr. Fitzpatrick: Thanks your Honor (R. 658)

Mr. Fitzpatrick: For the defendant Padilla, your Honor, I would like to renew my motion for the purpose of the record here. One ground is the insufficiency of the evidence as to Count 4, and also to Count 5.

Another is a motion for new trial on the ground of entrapment.

Another is a motion for new trial on the ground of illegal search and seizure.

Another is on the ground of prejudicial error committed by the Government's prosecuting attorney when he stood up in open Court and said to his Honor that he had checked the bank in Mexicali as to whether or not Padilla had an account there and they told him that there was no account.

I have submitted to the probation officer the defendant's account in that bank. It is not in his Honor's file there because the probation officer didn't have this in

time to get it to his Honor but it is in the probation officer's possession.

The Court: I have the report here and I have the record of the bank account.

Mr. Fitzpatrick: Does it show a bank account?

The Court: Yes.

Mr. Fitzpatrick: Then your Honor will notice that that bank account shows withdrawals at the time that the defendant said that the money was withdrawn and I submit it was prejudicial error for the government attorney to stand up here in Court and represent to his Honor as was represented. I am not saying that he was not in good faith when he said it. I am saying that he had obtained erroneous information and I feel this swayed the Court because the Court spent a great deal of time and asked numerous questions of the defendant as to when the withdrawals took place. I feel it swayed the Court toward its final decision.

The Court: Your motion is denied.

It is urged here that a letter from the Treasury Department, Bureau of Customs, San Diego 1, California, to Louglin E. Waters, United States Attorney, dated June 17, 1958, advised, in pertinent part, as follows: "Also, discovered in the glove compartment of the automobile was $2,156.00 in United States currency, and on the person of Gonzales $127.52 * * *. The $2,156.00 found in the automobile and the $127.52 found on the person of Gonzales were detained and placed in the custody of the Collector of Customs, San Diego. This was done pending further investigation and checking of the serial numbers to determine if any of the bills were listed with the Bureau of Narcotics as marked money. It was ascertained that the bills were not listed * * *."

It is urged here that the District Court below did not impose a fine; that the United States claims that it has a right to detain the money in the event that a future judgment is filed for penalties in a future Civil action for importing into the United States the heroin in question. But as shown from the transcript of record (R. 461 through 651) Antonio Espinoza Ramos confessed from the stand that he brought the heroin from Mexico and that petitioner was not involved. The Fifth Amendment declares that no person shall be deprived of his property without due process of law.

It is respectfully submitted that the petitioner proved the money was his and the Court below erred in holding that it did not have power to order the money returned to petitioner.

X.

PRAYER FOR THE WRIT.

It is respectfully prayed that the petition for Writ of Certiorari should be granted.

Respectfully submitted,

CRISTOBAL GONZALES PADILLA,
#75128—P. M. B.,
Leavenworth, Kansas.

Dated: July 22, 1959.

VERIFICATION.

United States of America,
State of Kansas,
County and City of Leavenworth—ss.

Cristobal Gonzales Padilla, having been first duly sworn, deposes and says that: He is the petitioner in the attached petition for writ of certiorari; that he has read and knows the contents of same; the same is true and correct to the best knowledge and belief of this affiant.

/s/ Cristobal Gonzales Padilla,
Affiant.

Subscribed and sworn to before me this 6th day of July, 1959.

/s/ R. H. Cleghorn,
Parole Officer.

"Authorized by the Act of July 7, 1955, to administer oaths (18 U.S.C. 4004)."